

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 January 2013

Public Authority: The National Gallery
Address: Trafalgar Square
London
WC2N 5DN

Decision (including any steps ordered)

1. The complainant requested information held by the National Gallery ("the gallery") relating to a drawing known as *La Bella Principessa*. The gallery disclosed some information and withheld other information using exemptions under the Freedom of Information Act 2000 ("the FOIA"). The exemptions relied on were section 36(2)(b)(i) and (ii), relating to prejudice to the provision of advice and exchange of views for the purposes of deliberation, section 41(1), relating to information provided in confidence, and section 40(2), the exemption relating to third party personal data.
2. The Commissioner's decision is that the gallery correctly withheld information using the exemptions under sections 36(2)(b)(i) and (ii), section 40(2) and 41(1) of the FOIA. He found breaches of section 1(1)(b), 10(1) and 17(1).
3. The Commissioner does not require any steps to be taken.

Request and response

4. On 5 December 2011, the complainant requested information in the following terms:

"1. All internal and external correspondence between [name] or other officers, employees or contractors of the National Gallery and any other person relating to 'La Bella Principessa' and/or [complainant's name]. The correspondence will include, without limitation, correspondence to and from [names], The Metropolitan Museum of Art, and Christie's

auctioneers. For the avoidance of doubt, our client does not regard any of the correspondence between [name] and himself as confidential. Although our client's email of 10th July 2011 to [name] referred to information that was confidential at that time, it has now passed into the public domain with the publication of the revised edition of Professor Kemp's book 'Leonardo', published by Oxford University Press on 6th October 2011.

2. Any research conducted by any officers, employees or contractors of the National Gallery relating to 'La Bella Principessa'

3. Any research, evidence or materials produced by third parties held by the National Gallery relating to 'La Bella Principessa'

4. Any agendas, minutes, papers or advice connected with meetings involving any officers, employees or contractors of the National Gallery relating to 'La Bella Principessa' and the National Gallery.

The list set out above is not exhaustive. If the National Gallery holds any other information in relation to or connection with 'La Bella Principessa' outside the scope of the aforementioned classes of information, then our client requires confirmation of and disclosure of the same".

5. The gallery sent an initial response on 5 January 2012. It said that it believed that some of the information requested was exempt under section 40(2), 41(1) and 36(2)(b)(i) and (ii). It said that it was consulting with third parties about the public interest test and it would send its complete response once this had been done.
6. The gallery sent a further response on 13 January 2012. It said that it held internal and external correspondence relating to the drawing and the complainant. It said that it did not hold research papers, agendas or minutes regarding the subject. It disclosed some information however it indicated that some information had been withheld using the exemptions referred to in its letter on 5 January 2012.
7. The complainant requested an internal review on 26 January 2012.
8. The gallery responded on 23 February 2012 and stated that, in the main, it upheld the position it had previously taken. It identified and disclosed one further email.

Scope of the case

9. The complainant contacted the Commissioner to complain about the way his request for information had been handled on 20 March 2012. He specifically asked the Commissioner to consider the following issues:
 - Whether the gallery had correctly withheld information under the FOIA using the exemptions cited.
 - Whether the gallery had identified all the information held falling within the scope of the request. One particular query was whether the gallery should have stated that it held information covered by legal professional privilege.
 - Some procedural issues arising from the handling of the request
10. For clarity, the gallery decided to disclose some additional information during the course of the Commissioner's investigation. That particular aspect of the complaint was therefore informally resolved by this disclosure.
11. In the complainant's request for internal review on 26 January 2012, the complainant complained about the gallery's failure to disclose copies of correspondence between the complainant and the gallery about this particular request. The complainant clearly already has this information and it has therefore not been considered any further during the Commissioner's investigation, nor has any other information that would already be in the complainant's possession.
12. It is pertinent to note that the complainant made a separate subject access request under separate cover on the same day for any information that would constitute his own personal data relating to the same subject matter. Personal data of which the requester is the subject is exempt from disclosure under the terms of the FOIA. This request was made in accordance with the rights of subject access provided by section 7 of the Data Protection Act 1998 ("the DPA"). The Commissioner has also received a complaint about that matter. The Commissioner's obligation under the DPA is to make an assessment. This has been carried out separately.

Reasons for decision

Section 1(1) – Was more information held?

13. Section 1 of the FOIA provides a general right of access to information held by public authorities. It states that any person making a request for information to a public authority is entitled to be informed in writing by

the public authority whether it holds information of the description specified in the request, and if that is the case, to have that information communicated to him.

14. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and argument. He will also consider the actions taken by the authority to check that the information was not held and he will consider if the authority is able to explain why the information was not held. For clarity, the Commissioner is not expected to prove categorically whether the information was held. He is only required to make a judgement on whether the information was held "on the balance of probabilities".¹
15. The Commissioner asked the gallery to confirm whether it wished to maintain its position that no further information falling within the scope of the request was held. The gallery said that was the case and it said it wished to assure the Commissioner and the complainant that it takes its obligations under the legislation seriously. The gallery said that in response to a request for information, the process is for the archivist to identify where the information is located either through his own knowledge or by asking relevant members of staff. In this case, the gallery said that the archivist's actions had been reviewed by a senior member of staff. Having conducted a number of checks, including reviewing searches for the information and discussing the matter with relevant members of staff, the gallery said it was confident that it had identified all the information falling within the scope of the request.
16. The gallery elaborated further on the searches it had undertaken. It said that when it received the request, the archivist contacted relevant members of staff and asked them to collate the information covered by the scope of the request by conducting relevant searches of emails and electronic information and paper files in response to the request. The gallery started to assemble the information on 6 December 2011. Subsequently, after further deliberations by the archivist and the board secretary on where information may be located, on 12 December 2011 the press office was also contacted and asked to search for relevant information. The process was then reviewed by a senior member of staff. A comparison of the searches made at the time of the original request with searches made at the time of the internal review showed that one email that had been identified in the original search had not

¹ This approach is supported by the Information Tribunal's findings in *Linda Bromley and Others / Environment Agency* (31 August 2007) EA/2006/0072

printed out fully. This error was rectified and the email was supplied to the complainant at the time of the internal review.

17. The gallery confirmed that the information that was collated and assessed by the archivist and board secretary was retained by the archivist. The gallery also confirmed that with the exception of some handwritten notes discussed below, it was not aware of any relevant information having been deleted, destroyed or mislaid. The gallery said that the complainant had acquired the drawing in 2007 and information relating to this matter would not therefore be held prior to that date. The gallery explained that its file plan specifies that records falling within the class of *curatorial research* and *professional liaison* have a retention period of 6 years. The gallery said that it is most likely that information sought by the complainant would fall within the categories described and would therefore have been retained as records.
18. In the complainant's request for internal review on 26 January 2012, the complainant highlighted an email from a journalist dated 28 June 2010 which makes reference to the gallery's director speaking about the drawing at a gallery event on 11 June 2010. The complainant complained that no information had been disclosed relating to this. The gallery responded specifically to this point and said that the complainant was referring to an introduction given by the director to a lecture. The gallery said that the director had been consulted and believed that he did prepare some handwritten notes but these were destroyed after the event. The gallery said that notes of this nature are considered to be of little significance and are therefore not recognised as records in the gallery's records file plan. However, if they were assigned a retention period, they would have been destroyed in any event by the date of the complainant's request in line with the gallery's record management procedures. The gallery also confirmed that the introduction had not been filmed.
19. The complainant also referred to correspondence between various parties that he expected to be held. When the Commissioner asked the gallery about the points raised, the gallery said that the complainant had listed a number of people and organisations that he had connected to *La Bella Principessa*. Having considered those points, the gallery reiterated that it had identified all the information that it held. It said that there was not necessarily any reason why the gallery should hold all of the information that the complainant had suggested should be held and the complainant's belief that this information must be held was an unreasonable expectation. Furthermore, some information referred to by the complainant had in fact been withheld and this has been considered by the Commissioner in his analysis below.

20. The complainant also expressed concern about a comment made in the gallery's letter of 23 February 2012 on page 10. The paragraph discusses how "research papers" were defined and the gallery concedes that a couple of items in its response could be described in this way however it says "neither discusses [name of complainant]". This comment gave rise to a concern over the understanding of the request. The Commissioner said that the complainant wished to highlight that the scope of the FOI request was wide and not limited only to information that discusses the complainant. While the Commissioner can appreciate why the complainant sought clarification about this particular comment, the gallery subsequently clarified that it had understood the scope of the request and conducted appropriate searches as described above.
21. Finally, the complainant asked the Commissioner to consider whether the gallery had any information that should have been identified and withheld using legal professional privilege. This concern arose because of comments made by the gallery in its letter to the complainant of 13 January 2012 when it told the complainant that personal data had been disclosed to its legal advisors. The gallery clarified that it had sought legal advice after it had received the requests in question and therefore that information did not fall within the scope of the requests. Reference was only made to this matter to address the queries raised by the complainant regarding how his personal data had been processed by the authority.
22. Based on the above, the Commissioner decided that on the balance of probabilities, no further information was held at the time of the request. The gallery has been able to account for the actions it took to respond to the request clearly and in detail. In the Commissioner's view, there is no persuasive evidence to indicate that the gallery had not identified all the information it held falling within the scope of the request.

Section 36(2)(b)(ii) – Prejudice to the effective conduct of public affairs

23. This exemption concerns prejudice to the effective conduct of public affairs. Section 36(2)(b)(i) and (ii) are concerned specifically with prejudice to the provision of advice and the free and frank exchange of views for the purposes of deliberation. Unlike other exemptions in the FOIA, it is engaged if a qualified person at the public authority confirms that it is their opinion that the exemption is engaged and that opinion is a reasonable one.
24. In order to establish whether the exemption was engaged, the Commissioner will:
 - Establish that an opinion was given

- Ascertain who the qualified person was
 - Ascertain when the opinion was given
 - Consider whether the opinion was reasonable
25. The Commissioner confirmed that the gallery's qualified person (the director) had given his opinion that the information was exempt. The gallery said the qualified person had signed a section 36 certificate to confirm his opinion and this had been provided to the complainant at the time of its refusal. A copy of this was also provided to the Commissioner. He was satisfied that the opinion of the qualified person was that section 36(2)(b)(i) and (ii) were engaged.

Was the qualified person's opinion reasonable?

26. The Commissioner bases his understanding of the word "reasonable" on its plain meaning. The definition in the Shorter English Dictionary is "in accordance with reason; not irrational or absurd". The opinion only has to be a reasonable one and this part of the exemption is therefore not a high hurdle. An opinion that a reasonable person could hold is a reasonable opinion. It does not have to be the only reasonable opinion that could be held, or the 'most' reasonable opinion. For clarity, the Commissioner does not have to agree with the opinion. He only has to recognise that a reasonable person could be of that opinion.
27. The gallery confirmed that prior to providing his opinion the qualified person had been sent a copy of the gallery's proposed response, together with the information intended for release. He was not provided with a copy of the withheld information although the gallery said that its draft response did indicate the nature of the withheld information and the recommended reasons for withholding it. It confirmed that the qualified person had also attended a meeting with the archivist during which the issues involved were discussed. He was also consulted again when the gallery decided to apply the exemption more broadly than it had at the time of its original refusal.
28. The gallery said that it had explained to the complainant that the information withheld under this exemption broadly falls within the following categories:
- (a) the exchange of opinions relating to the drawing
 - (b) the drafting of a response to an enquiry from the complainant of 8 September 2011 regarding the drawing and the exhibition
 - (c) press strategy
29. The argument advanced in the initial refusal was as follows:

"It is our view that disclosure of the information withheld under this Section would inhibit the ability of the Gallery's officers to advise and exchange views in a free and frank way. It is important that the Gallery's officers are able to engage in deliberation on the matters listed above without any inhibition that such views will be made public. Without the ability to debate such views freely and frankly and engage in an open exchange of ideas, the ability of the Gallery's officers to carry out their official duties would be significantly diminished".

30. The exemption specifies that the prejudice to the provision of advice or the free and frank exchange of views has to meet the threshold of "likely" or "would be likely". It has been established in various decisions of the Information Tribunal that the word "would" denotes a level of risk that is "more probable than not" and "would be likely to" means that the level of risk is less but still real and significant and certainly more than a remote possibility. The complainant complained that it was not entirely clear which threshold the gallery's qualified person considered applied. For the avoidance of any doubt, the gallery confirmed that the qualified person's view was that the prejudice "would" occur.

31. The Commissioner asked the gallery to elaborate upon the rationale advanced. The arguments put forward focused on notions of "safe space" and "chilling effect", terms that have become well-known in the context of this particular exemption. As discussed in the Commissioner's published guidance:

"Safe space' arguments are about the need for a 'safe space' to formulate policy, debate 'live' issues, and reach decisions without being hindered by external comment and/or media involvement. Such arguments are related to, but not the same as 'chilling effect' arguments, and care should be taken to differentiate between these two concepts... 'Chilling effect' arguments are directly concerned with the argued loss of frankness and candour in debate/advice which it is said would result from disclosure of information under FOIA".

32. The gallery said that it considered that disclosure of the information would result in external pressure on gallery staff and external contributors to accommodate the views of commercial dealers and owners, acting in their own interests, causing a significant distraction and disruption to the high value it places on those involved being able to discuss issues connected to works of arts privately within a "safe space". The gallery also expressed concerns that the disclosure of the information in this case would have a "chilling effect" on its staff when discussing issues connected to works of art because it considered that those discussions would be less candid if the information was disclosed.

It particularly considered that contributions from external sources would be less candid.

33. The gallery explained to the Commissioner that because of the nature of the work that it does, there is a particular need to guard against external influences and pressures that may interfere with its independent ability to make decisions about works of art. The gallery's risk management statement on "Relations with lenders, dealers and collectors" highlights the considerable benefits to be gained by a work of art being on loan to the gallery. It says:

"Such benefits include: freedom from the costs of private insurance and other security arrangements via government indemnity; the facilitation of public access allowing continued tax exemption for designated items; increased reputation for the painting as a result of having been seen to have been selected for display in one of the world's pre-eminent public galleries, resulting in an enhanced market price if the owner chooses to sell".

34. The gallery also brought to the Commissioner's attention its concern about the risk of academics, including its own staff, being dissuaded from expressing their views with candour, for fear of provoking an emotive response or possible legal action. In particular, the gallery highlighted an article called "The Law vs Scholarship" published in the Art Newspaper in December 2011, discussing this type of issue. For ease of reference, that article can be accessed via the following link:

<http://www.theartnewspaper.com/articles/The%20law%20vs%20scholarship/25155>

35. The gallery highlighted the level of attention that this particular drawing has received and pointed out that the debate about the attribution of the drawing is an on-going one. Given the prominence of the artist involved, and the high price that would be associated with a genuine art work by that artist, there has been considerable press and public interest in the drawing. As an example, *The Daily Telegraph* published the following article by Mr Richard Dormont on 12 April 2010 about *La Bella Principessa* and the authentication issues involved, which can be accessed via the following link:

<http://www.telegraph.co.uk/culture/art/7582591/La-Bella-Principessa-a-100m-Leonardo-or-a-copy.html>

36. The gallery argued that against this background, any future discussions it may wish to have about this particular drawing would be prejudiced as

would any future discussions it had about other works of art, if the withheld information was disclosed to the public.

37. The complainant argued that any academics, curators or experts who make their living by publishing, lecturing, curating and displaying artistic works and express opinions to a public authority that is under a statutory duty to disclose information under the FOIA, can have no legitimate expectations of privacy. He argued that this was particularly the case where their personal data, credentials and opinions of such individuals are readily available in the public domain.
38. The Commissioner did not find the complainant's representations above convincing. The Commissioner understands that the views of others are provided on a voluntary basis and their roles in the art world as described above by the complainant would not necessarily mean that there could be no expectation of confidence. The broader context must be taken into account. That is also true of the fact that the public authority is subject to the FOIA. The FOIA contains various exemptions to disclosure and it is not correct to suggest that the mere existence of the legislation removes any expectation of confidence that may otherwise exist. Whether or not information should be disclosed under the FOIA is based on an analysis of the information in question and the circumstances of the particular case.
39. The Commissioner accepts that if any of these individuals have already expressed a public view that may affect their expectations to some extent, however, that would still not automatically mean that they would expect the details of their engagement with the gallery to be disclosed. Similarly, it has become a well-established matter of principle that the nature of a public role, as well as the seniority of those involved, can affect the expectations of transparency that those individuals have. However, that is only one relevant factor, and regard must also be had to other relevant circumstances and the nature of the information.
40. The Commissioner considered the withheld information, the arguments presented by the qualified person and the wider circumstances of the case. He was satisfied that the qualified person's opinion was a reasonable one in view of the nature of the information and the context in which these discussions were taking place. He was satisfied that in view of these considerations, it was reasonable for the qualified person to conclude that disclosure of the information would have hindered the gallery's ability to receive advice and consider the issues involved in a free and frank manner for the reasons described above. The Commissioner therefore accepts that section 36(2)(b)(i) and (ii) were engaged in this case.

Public interest

41. Having concluded that section 36(2)(b)(i) and (ii) were engaged, the Commissioner went on to consider the public interest test. Section 36 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighed the public interest in disclosing the information.
42. In *Guardian and Heather Brooke v the Information Commissioner and the BBC* (EA/2006/001 and EA/2006/0013), the Information Tribunal provided some general principles about the application of the public interest test in section 36 cases. Please see paragraphs 87 to 92 of that decision for further details at the following link:

<http://www.informationtribunal.gov.uk/DBFiles/Decision/i81/Guardian%20Brooke.pdf>

Public interest arguments in favour of disclosing the requested information

43. The “default setting” of the FOIA is in favour of disclosure. This is based on the underlying assumption that the disclosure of information held by public authorities is in itself of value. Disclosure of information serves the general public interest in promotion of better government, through transparency, accountability, public debate, better public understanding of decisions and informed and meaningful participation of the public in the democratic process.
44. More specific to this case, there is a public interest in the disclosure of information that relates to works of art and how decisions are made about them. The primary public interest will be in understanding the reasons to justify the decision not to include the drawing in the exhibition, however, there is also a public interest in understanding how the gallery chose to handle press interest in the matter and how it chooses to represent its own position in the debate, to the public in general and to the complainant more specifically.
45. The gallery has statutory responsibilities as the national collector of western European painting from the 13th to the 19th centuries. An explanation of the gallery’s constitution is set out in the Museums and Galleries Act 1992 which can be accessed via the following link:

<http://www.legislation.gov.uk/ukpga/1992/44/section/2>

46. The Commissioner would like to draw particular attention to the general function of the National Gallery Board to undertake the following activities in the public interest:

" (1)So far as practicable and subject to the provisions of this Act, the National Gallery Board shall maintain a collection of works of art, principally consisting of pictures, of established merit or significance, and of documents relating to those works, and shall—

(a)care for, preserve and add to the works of art and the documents in their collection;

(b)secure that the works of art are exhibited to the public;

(c)secure that the works of art and the documents are available to persons seeking to inspect them in connection with study or research; and

(d)generally promote the public's enjoyment and understanding of painting and other fine art both by means of the Board's collection and by such other means as they consider appropriate"

47. The authentication of a work of art, particularly by such a prominent artist, is a matter of considerable public interest. The gallery made it clear to the Commissioner that if the gallery displays a work of art on its walls in an exhibition or as part of its collection it effectively endorses that work of art. The complainant told the Commissioner that he genuinely believes that the drawing, *La Bella Principessa*, is a previously unrecorded work by Leonardo da Vinci. He says that he has support in this belief from a number of prominent art historians including Martin Kemp, Professor of the History of Art at Oxford University, and author of the book, *"La Bella Principessa – The Story of the new masterpiece by Leonardo da Vinci"*. The book claims that technology has been used to demonstrate the work's authenticity, and its preface is written by the former curator of drawings at the British Museum and the Getty. Kemp has called the drawing "the most important rediscovered work by the artist in over a century".
48. The complainant has highlighted that neither the director of the gallery nor the curator have viewed the drawing. The gallery has refused the offer of a loan of the drawing for free and for the drawing to be included in the exhibition even as an unattributed work. The complainant said he would also allow the drawing to be independently tested if required. Against this background, the complainant expressed dissatisfaction with details included in *The Daily Telegraph* newspaper. He alleged that that the director had publicly expressed scepticism about the attribution of the work to Leonardo da Vinci in the article referred to in paragraph 35

of this notice. Particular attention is drawn to the observation that the director of the gallery has not endorsed the drawing and the following comments:

"When I asked if the gallery would like to include the drawing in its forthcoming Leonardo exhibition, he replied dryly, "We have not asked to borrow it".

49. The complainant said that the gallery's response to his drawing should be contrasted to another previously non-attributed work which is also owned by a private collector, *Salvator Mundi*, which was included in the exhibition.
50. The complainant argues that given the above circumstances, there is a strong public interest in understanding more about the gallery's position in this debate and how it has handled the issues involved. More generally, the complainant argued that there is a strong public interest in the gallery being transparent about how and when it consults with others, and the reasons why it makes decisions, in the exercise of public functions.

Public interest arguments in favour of maintaining the exemption

51. The gallery argued that the public interest in maintaining the exemption outweighed the public interest in disclosing the information in the circumstances of this case. As already discussed, the Commissioner accepts that the qualified person's opinion was reasonable that disclosure at the time of the request would have resulted in external pressure being brought to bear on gallery staff and external contributors to accommodate the views of commercial dealers and owners, acting in their own interests. The Commissioner also accepts that disclosure of the information would have a "chilling effect" on the gallery's staff and external individuals because it would affect the candour of their exchanges.
52. In short, the prejudice resulting from disclosure would have the impact of reducing the gallery's ability to carry out its main functions. The gallery explained that the Museums and Galleries Act 1992 states that the Board of Trustees of the National Gallery should add to the works of art and documents in their collection. In acquiring art works, the trustees rely on the expertise of members of the gallery's curatorial department. A potential acquisition for the gallery will need to be thoroughly researched to ensure that the attribution to an artist is correct and this will involve engaging in free and frank dialogue, both internally and externally, in the UK and internationally. Curators also need to satisfy the board that the painting is in good condition and has not been heavily altered by previous restorations. The painting can only

be recommended once the curator has determined that the painting is an authentic and outstanding example of an artist's work and will help the gallery to illustrate more fully the development of western European painting.

53. The gallery also said that if it could not engage fully in free and frank dialogue, the resulting risks would undermine public trust and confidence in the gallery as a national museum, which must maintain high standards. The gallery said that it considered that this would prejudice its mission to promote the public's enjoyment and understanding of painting and other fine art. The gallery said that it was an extremely important matter of principle that its curators should have complete freedom to choose which works to display in an exhibition, in order to ensure that the public may properly benefit from their specialist knowledge. There must be no suggestion that the gallery has been in any way unduly influenced by private interests, such as those of dealers, auction houses and owners. The gallery also pointed to the reputational risk of acquiring works that have not undergone proper checks and been subject to rigorous academic debate by specialists.

Balance of the public interest arguments

54. The Commissioner asked the gallery how its handling of this particular matter and its wider approach to discussions about works of arts, meets its broader aims and purpose, particularly in view of the complainant's criticisms.
55. The gallery said that it is important to appreciate that generally, it does not comment on works of art owned by third parties, unless within a scholarly framework such as an exhibition catalogue or academic publication or as part of an opinion service offered to the public. It said that in relation to exhibitions, any comments made will generally focus on the items it has chosen to include and it is not normal practice to publicise works that have not been included in an exhibition. The gallery said that in relation to the opinion service, it is important to note that this service does not authenticate or extend to works of art outside of the gallery's collection policy. The gallery explained that it is the national collector of western European painting and not "old master" prints and drawings. Therefore, *La Bella Principessa* is a drawing which falls outside the remit of the gallery's collection policy.
56. The Commissioner asked the gallery to explain what it had told the complainant or the public about the reasons for not including the drawing in the exhibition. In response to a request by the complainant's lawyers that the gallery should consider *La Bella Principessa* for inclusion in the exhibition, the gallery said that the complainant was informed that the gallery's selection policy for exhibitions must be consistent with

the theme and intention of the exhibition and that is it not open to influence by private owners of works of art. The gallery did not make any comments in respect of the drawing's authenticity. With particular reference to the comments made in *The Daily Telegraph* article referred to above, the gallery said that it was important to see those comments in their appropriate context. It said that the journalist had attributed scepticism to the director's comment and the director had only essentially confirmed that the gallery had not asked to borrow the drawing.

57. The gallery explained to the Commissioner that the case for inclusion of the *Salvator Mundi* in the exhibition was very different to the case for *La Bella Principessa*. The gallery highlighted that the general consensus amongst scholars was that the painting was likely to be authentic and it also fitted in well with the overall scheme of the exhibition, which was to re-evaluate Leonardo as a painter during the period in which he worked in Milan. By contrast, there is less of a consensus about the *La Bella Principessa* and it did not fit as well with the scheme of the exhibition. The gallery explained that each section of the exhibition was organised around one or more paintings by Leonardo da Vinci (or in the case of *The Last Supper*, a contemporary copy). These were then supported by a selection of relevant drawings. *La Bella Principessa* bore no direct relation to any of the main exhibits.
58. In the Commissioner's view, the gallery could have explained more clearly the reasons for not including the drawing in the exhibition. The fact that it is not directly obliged to or does not usually justify its decisions regarding non-inclusion of art works in exhibitions, does not mean that there does not remain a strong public interest in doing so to a reasonable extent in this case. The gallery clearly fully appreciates the impact inclusion of an art work in an exhibition can have, however, conversely, non-inclusion of an art work can also have an impact, not least because of the impression this gives, which is only heightened by press speculation. It is important for the public to be able to understand why those decisions have been taken. Clearly the gallery has concerns about catering to private interests however there is a wider public interest in transparency in relation to art works that, if genuine, would be a very significant discovery.
59. However, while the Commissioner accepts that there is a strong public interest in the gallery being transparent about its decisions relating to art works, there remains the question of degree. The Commissioner has broadly outlined the reasons for not including *La Bella Principessa* in the exhibition. Whether the public interest favours disclosure of more precise details about the gallery's discussions about the drawing depends on the nature of the information and factors such as the severity of prejudice to other activities that are in the public interest. It

is worth highlighting for clarity that although the Commissioner must give weight to the qualified person's opinion once he has accepted its reasonableness, it is open to the Commissioner to consider the severity, frequency and extensiveness of any prejudice that would occur. This was one of the general principles established in the case of *Guardian and Heather Brooke v the Information Commissioner and the BBC* (EA/2006/001 and EA/2006/0013).

60. The Commissioner considered as part of his overall analysis, the sensitivities involved in this particular matter given the nature of the drawing in question. He has also had regard to the fact that the debate about the authenticity of this drawing is still on-going. In the Commissioner's view, the presence of these factors increases the risk that disclosure would have a severe impact on the ability of the gallery to engage in a free and frank manner about the issues involved. The Commissioner considers that the prejudice experienced would be most severe in relation to any future discussions about this particular drawing that may take place. However, the Commissioner also considered that there was a risk that prejudice to future discussions about art works in general would be sufficiently severe in view of the fact that the debate about *La Bella Principessa* is an on-going one, albeit that the decision about displaying the drawing at the particular exhibition is no longer a live issue. Chilling effects are likely to be more severe where that is the case than they would be where matters have essentially been resolved. It is important to note that the information is not merely limited to a decision about the exhibition. The majority has a broader application and relates more generally to the gallery's deliberations in connection with the drawing.
61. The Commissioner would also like to explain that as part of his general analysis in relation to the broad categories of information discussed below, he had regard to the fact that the severity of the prejudice caused by the disclosure of various items of information varied in degree. In relation to some of it, the Commissioner considered that the prejudice would be much less because of the precise nature of the information. However, where that was the case, the Commissioner considered how much disclosure of that particular item of information would usefully contribute towards the public's understanding of the issues involved in making his decision about whether the public interest favoured disclosure. He found that the public interest did not favour disclosure of any of information falling within this area.
62. As regards the exchange of opinions relating to the drawing, the Commissioner notes that this information, if disclosed, would reveal the precise opinions of various external contributors about the drawing or other views connected to the matter. For the reasons already outlined, the gallery depends heavily on the views of others to help it to make

appropriate decisions about works of art and these views are offered on a voluntary basis. In light of the general basis upon which these views are offered, the Commissioner considers that disclosure of the information would be likely to have a severe impact on the candour of the contributions that others make and may discourage some from contributing altogether. This would, the Commissioner accepts, be counterbalanced to some extent by the nature of the role that some of those individuals have, and the cooperative nature of the relationship that exists between those individuals and the gallery. Nonetheless, the Commissioner was satisfied that the impact of disclosure would be sufficiently severe in the circumstances of this case.

63. In relation to the views of the gallery's own staff, the Commissioner notes that many of the comments relating to the drawing are made by individuals in relatively senior positions, including the director. The Commissioner considers that the public are entitled to expect individuals in these positions to demonstrate a degree of professionalism commensurate with the role and that they would be reasonably robust. As highlighted by the gallery, the risks of not making appropriate decisions regarding art collections are great and in the Commissioner's view, this would counterbalance the impact on the provision of advice and the free and frank exchange of views to a significant extent. For these reasons, the Commissioner does not consider that the severity of the prejudice caused in respect of the gallery's own staff would be as significant as that relating to external contributors. Nonetheless, he appreciates that it is likely that outside pressure and criticism may have a sufficiently severe impact on the candour of future discussions given the sensitivities involved.
64. The Commissioner considers that the prejudice described would clearly severely impact on the gallery's main functions and would substantially increase the risk of reputational damage. It is not the Commissioner's view that it would be proportionate to expect the gallery to disclose all the details provided by external contributors or all the deliberations of its own staff. The reasons for not including the drawing in the exhibition have been outlined already and having considered the withheld information, the Commissioner did not consider that it was revealing of any particular matters that should be brought to the public attention despite the prejudice that would be caused to the public interest in other respects.
65. Turning now to the withheld correspondence that relates to the preparation of a letter to the complainant. The Commissioner considered that the impact of disclosing this type of information would not be as severe as the disclosure of information that is more revealing of the personal views held by external parties. Again, the Commissioner would say that the public are entitled to expect the gallery's staff to be

reasonably robust. However, the Commissioner has had regard to the context of these deliberations and the fact that they concerned how to respond to a letter from the complainant's lawyer. Given the sensitivities involved, and the possibility of legal action, the Commissioner considers that the impact of disclosure would be sufficiently severe.

66. The Commissioner appreciates that there is a public interest in understanding more about how decisions are made, and not purely what the outcome is. This may lead to an improvement in the quality of deliberations. On the other hand, disclosure of internal deliberations may ultimately undermine an authority's chosen position, or lead to unproductive questioning of that decision, causing a chilling effect in relation to future exchanges. Whether that is appropriate will depend on the context. Following inspection of the withheld information, the Commissioner did not consider that the nature of the information would add to the public's understanding of how the authority dealt with this matter to the extent that it would be in the public interest to disclose despite the risk of prejudice to the candour of future exchanges.
67. Finally, the gallery withheld a number of emails involving its response to the press on issues connected to the drawing. These include internal communications with its press office, communications with journalists and documentation relating to press strategy. Again, to some extent, the public are entitled to expect that the gallery's staff would be sufficiently robust to withstand the impact of disclosure. In relation to journalists, the Commissioner had regard to the relatively innocuous nature of some of the information and the public, investigative nature of a journalist's work. He considered that to some extent, this would counterbalance the impact of disclosure. However, some of the information involves commentary of a more free and frank nature and the Commissioner has also had regard to the fact that all of this information relates to the sensitive sphere of public and press relations and in view of this, the Commissioner considered that it is likely that the impact of disclosing this information would be sufficiently severe in relation to the gallery's ability to manage press appropriately and build cooperative relationships.
68. The Commissioner considers that there is a public interest in understanding more about the way in which the gallery responds to the press and why. However, it is also particularly important that public authorities are able to maintain a safe space in which to have these types of discussions, to explore the possible options freely, and make an appropriate decision based upon those deliberations. Disclosure could undermine the gallery's position or result in unproductive questioning, causing a chilling effect to future exchanges. The Commissioner has already outlined the gallery's general policy on commenting on art work and having inspected the withheld information, the Commissioner did

not consider that it would add to the public's understanding of the issues involved to the extent that it would outweigh the prejudice that would be caused.

Section 41 – Information provided in confidence

69. This exemption provides that information is exempt if it was obtained by the public authority from any other person and the disclosure would constitute an actionable breach of confidence.
70. The gallery applied this exemption to information to drafts of a newspaper article sent to the gallery by a journalist. For clarity, although the gallery considered that this exemption was engaged in respect of other information as well, during the Commissioner's investigation, the gallery decided to apply the exemption under section 36 to more information that it had at the time of its original refusal following further consultation with the qualified person. As the Commissioner was satisfied that this information was exempt under section 36, it was not necessary to also consider the applicability of the exemption under section 41 to that information.

Was the information obtained from another person?

71. The Commissioner considered the withheld information and was satisfied that the information had been obtained from another person, in this case the journalist involved.

Would disclosure constitute an actionable breach?

72. The Commissioner has gone on to consider the test set out in *Coco v A N Clark (Engineers)* [1968 FSR 415] concerning an actionable breach of confidence. The test in the latter case states that a breach of confidence will be actionable if:

- The information has the necessary quality of confidence
- The information was imparted in circumstances importing an obligation of confidence; and
- There was an unauthorised use of the information to the detriment of the confider (although detriment is not always necessary)

73. Information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial. Especially in the context of personal matters, even some trivial information can be confidential when considered in the context of the right to privacy provided by the Human Rights Act 1998. Information which is known only to a limited number of individuals will not be regarded as being

generally accessible although information that has been disseminated to the general public clearly will be. Information which was important to the confider cannot be considered to be trivial. The gallery said that the information was not trivial and was not otherwise publicly accessible. The Commissioner was satisfied that this was the case.

74. Even if information is to be regarded as confidential, a breach of confidence will not be actionable if it was not communicated in circumstances that created an obligation of confidence. An obligation of confidence may be expressed explicitly or implicitly. The gallery told the Commissioner that it had consulted the newspaper concerned and it was informed that the newspaper considered that the correspondence in question had been communicated with an expectation of confidentiality. The Commissioner was satisfied that there was no evidence to suggest that the journalist involved did not make the draft copies of the article available to the gallery on a confidential basis. The communications clearly took place voluntarily, as part of a process of engagement between the gallery and the newspaper.
75. It will not always be necessary to show that the disclosure of the information would cause a detriment to the confider. In *Attorney General v Guardian Newspapers [1990] 1AC 109*, Lord Keith of Kinkel found that it would be a sufficient detriment to the confider if information given in confidence was disclosed to persons whom the confider "...would prefer not to know of it, even though the disclosure would not be harmful...in any positive way". However, the Commissioner notes that the disclosure of draft newspaper articles provides significant details about the way in which the journalist worked on the story. Having regard to the contentious background surrounding the drawing, the Commissioner was satisfied that disclosure could have a detrimental impact on the journalist concerned. The Commissioner has had regard to the potential for the disclosure to attract unwelcome commentary or criticism of the views expressed or actions taken. The disclosure may also impact on the candour of press communications with the gallery in the future to some extent.
76. The Commissioner also considered whether there would have been a public interest defence available if the gallery had disclosed the information. As section 41(1) is an absolute exemption, there is no public interest test under section 2 of the FOIA. However, case law suggests that a breach of confidence will not be actionable in circumstances where a public authority can rely on a public interest defence. The duty of confidence public interest test assumes that the information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence.

77. The Commissioner takes the view that a duty of confidence should not be overridden lightly. Disclosure of any confidential information undermines the principle of confidentiality itself which depends on a relationship of trust between the confider and the confidant. It is the Commissioner's view that people would be discouraged from confiding in public authorities if they did not have a degree of certainty that such confidences would be respected. It is therefore in the general public interest that confidences are respected.
78. Aside from the wider public interest in preserving confidentiality, there is a public interest in protecting the confider from detriment. The Commissioner has noted that a legitimate concern would be that the disclosure could attract unwelcome commentary or criticism, and this is particularly true in view of the contentious background to this case. In the circumstances of this particular case, the Commissioner's view is that it is important that individuals are not discouraged from making information available to the gallery that assists the gallery with its work. The Commissioner notes that cases involving high profile authentication issues like this one can become very charged and against that background, the need for a confidential space in which to have those exchanges with journalists becomes even more pressing. It is clear that the very nature of the issues concerned warrant a level of candour and the gallery relies on the informal and voluntary cooperation of other individuals. Disclosure of this information may ultimately undermine the quality of the exchange, making it more difficult for the gallery to manage press appropriately in the future.
79. The Commissioner appreciates that there would be some legitimate public interest in understanding how the journalist and the gallery engaged on the subject of this particular article. However, the finished article is now in the public domain and having inspected the withheld information, the Commissioner did not consider that it was revealing of any particular factors that would justify overturning the principle of confidentiality for public interest reasons. To justify that, the public interest would need to be particularly strong.
80. In light of the above, the Commissioner formed the view that the public interest in preserving the principle of confidentiality was stronger in the circumstances of this case and that there would be no public interest defence available if the council had disclosed the information.

Section 40(2) – Third party personal data

81. This exemption provides that third party personal data is exempt if its disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the DPA.

Is the withheld information personal data?

82. Personal data is defined by the DPA as any information relating to a living and identifiable individual. For clarity, where the Commissioner has found that information was exempt for other reasons, he has not also considered the application of section 40(2) to that information. The only issue that it was necessary for the Commissioner to consider in relation to this exemption was the decision to withhold the name and email address of a member of the public from information that had been disclosed.

Would disclosure breach the Data Protection Principles?

83. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle and the most relevant in this case states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focused on the issue of fairness. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individual and the potential consequences of the disclosure against the legitimate public interest in disclosing the information.

Reasonable expectations

84. For clarity, the correspondence relates to a member of the public making a separate request for information to the gallery. The Commissioner considers that the member of the public concerned would have had a reasonable and legitimate expectation that their identity and contact details would not be disclosed to others. Correspondence sent by members of the public to public authorities typically carries this expectation and there is nothing about the nature of this correspondence that would suggest that this would not have been the case in this instance.

Consequences of disclosure

85. In view of the reasonable expectation above, the Commissioner considered that disclosure could cause distress or result in unwanted contact.

Balancing the rights and freedoms of the data subject with the legitimate interests in disclosure

86. There is always some legitimate interest in the disclosure of information held by public authorities in line with the general principles of promoting transparency and accountability. However, given the nature of the withheld information and the reasonable expectations associated with its future use, the public interest is very limited. The information relates to

a private individual who could reasonably expect confidence in the circumstances. In the Commissioner's view, the gallery has satisfied the legitimate public interest to a reasonable extent by disclosing this correspondence with the name and contact details redacted and therefore section 40(2) was engaged.

Procedural issues

87. The gallery responded to the request outside the 20 working day time frame and it also disclosed some additional information during the course of the Commissioner's investigation that it had initially sought to withhold. The Commissioner has therefore found a breach of section 10(1) and 1(1)(b) of the FOIA.
88. The gallery did not properly explain why the information was exempt within the 20 working day time frame. This was breach of section 17(1).

Other matters

89. The Commissioner notes that the gallery took longer than 20 working days to complete its internal review on this occasion. Although there is currently no statutory time frame for completing internal reviews, the Commissioner would like to highlight that the Code of Practice under section 45 of the FOIA states that internal reviews should be undertaken "promptly". The Commissioner considers that an internal review should generally not take longer than 20 working days.
90. The Commissioner would also like to highlight that the certificate used as evidence of the qualified person's opinion by the gallery could be improved in the future by including details about why the exemption was considered to be engaged rather than only rationale about the public interest test. The gallery may find it useful to use the Commissioner's published guidance when dealing with future requests involving the application of this exemption. For ease of reference, the template can be accessed via the following link:

http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/section_36_record_of_the_qualified_persons_opinion.ashx

Right of appeal

91. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

92. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
93. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

**Lisa Adshead
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